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80-6844

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BUDDY EARL JUSTUS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Do the Fifth, Eighth and Fourteenth Amendments permit a finding of aggravated circumstances, a prerequisite to a death sentence, to be based solely upon the guilty plea of a capital defendant where the State fails to establish the corpus delicti of an aggravating circumstance independent of a defendant's in-court admissions?

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Buddy Earl Justus ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered March 12, 1981.

I. CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is attached hereto as Appendix A. The opinion is officially reported at ____Ga.____, 276 S.E.2d 242 (1981).

II. JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 12, 1981. No motion for rehearing was

filed. On April 30, 1981, Mr. Justice Powell entered an "Order Extending Time to File Petition for Writ of Certiorari" until June 10, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), inasmuch as petitioner is alleging a deprivation of rights in the Georgia Supreme Court below.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> ". . .nor cruel and unusual punishments inflicted";

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This case also involves, in relevant part, the following Georgia statutes:

> §27-2534.1(b)(2) Mitigating and Aggravating Circumstances; Death Penalty
>
> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider . . . any . . . aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which

may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery . . .;

Ga. Code Ann. §26-2001:

A person commits rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ;

Ga. Code Ann. §26-1901:

A person commits the crime of robbery when with intent to commit theft, he takes property of another from the person or immediate presence of another (a) by use of force . . .;

Ga. Code Ann. §26-1311:

A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will . . .

IV. STATEMENT OF FACTS

A. Procedural History of the Case

Petitioner entered a plea of guilty to the October 7, 1978, murder, rape, robbery and kidnapping of Rosemary Jackson on June 13, 1980, in the Superior Court of Gwinnett County, Georgia (CP 10).[1] On that same date, but prior to the entry of the plea, the State filed its "Notice

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[1]Each reference to the clerks papers in this case shall be designated as "CP"; each reference to the transcript of proceedings in the Superior Court shall be designated as "T" with the corresponding date of the proceeding. The clerks papers are attached as Appendix B.

of Aggravating Circumstances," pursuant to Georgia Annotated Code §27-2534.1, as a predicate to its request that petitioner be sentenced to death (CP 7-9).

On June 21, 1980, an aggravated circumstances hearing was conducted pursuant to Ga. Code Ann. §27-2534(b) and on June 24, 1980, the court found the existence of four aggravating circumstances beyond a reasonable doubt (CP 11-12, T. 2, 6-24-80).[2] Based upon the finding of the aggravating circumstances in relation to the crime of murder, the trial court sentenced petitioner to death for the crime of murder (CP 13, T. 3, 6-24-80). The court also sentenced petitioner to life for the crimes of rape, armed robbery and kidnapping (CP 14, T. 4, 6-24-80).

On July 22, 1980, an appeal was filed on petitioner's behalf in the Georgia Supreme Court (CP 1). No assignments of error were cited in appellant's brief, but the appellant requested the State Supreme Court to "review the record in this case as to any error that might exist . . . as to the fairness of the proceedings and as to the fairness of the sentence . . ." (Appellant's Brief, page 5).

The Georgia Supreme Court, in an opinion dated March 12, 1981, affirmed petitioner's conviction and sentence of death. (See Appendix A) No motion for rehearing was filed.

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[2]The court found that the murder of Mrs. Jackson was committed while the offender was engaged in the additional capital felonies of armed robbery, Code §27-2534.1(b)(2); kidnapping with bodily injury; rape; and that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim (Code §27-2534.1(b)(7)).

B. Facts Surrounding the Crime and Relied Upon at the Aggravating Circumstances Hearing

The evidence offered by the State to prove the existence of the aggravating circumstances was presented to the trial court on June 21, 1980. The evidence disclosed that on October 7, 1978, the victim and her sister-in-law, Ms. Bertie Jackson, had gone shopping together at the Lilburn Square Shopping Center (T. 38, 6-21-80). The deceased and Bertie Jackson had parted company at approximately 2:00 p.m.; they were to meet again at approximately 2:30 p.m. (T. 38, 6-21-80). Ms. Bertie Jackson testified that the victim never returned and she therefore notified the police (T. 17, 6-21-80).

At approximately 3:30 p.m. on October 7, 1978, the victim and a man identified as petitioner entered a truck stop located 8.2 miles from the shopping center and purchased a C.B. radio (T. 27, 34, 6-21-80). Mrs. Jackson used her credit card to purchase the radio, (T. 28, 6-21-80), although petitioner "did all the talking" (T. 27, 6-21-80).

On October 9, 1978, Rosemary Jackson's body was discovered approximately 16 miles from the Lilburn Shopping Center (T. 17, 34, 6-21-80). The medical examiner testified that she had been stabbed three times: once in the right front chest, which penetrated into the lung, through the diaphragm and into the liver, and twice in the back of the chest (T. 9, 6-21-80). Mrs. Jackson had also been shot, the bullet entering at the base of the skull (T. 9, 6-21-80). The doctor testified that the gunshot was the cause of death (T. 10, 6-21-80). It was the doctor's opinion that

Mrs. Jackson was still alive when the gunshot wound was inflicted (T. 11, 6-21-80).

Further medical testimony established that there were no additional injuries, wounds or bruises to the body (T. 11, 6-21-80); the doctor was unable to determine if there had been any sign of a struggle before the fatal shot was fired (T. 11, 6-21-80). Finally, the medical examiner testified that he was aware of a report indicating that semen had been detected in smears of the victim's vaginal secretions (T. 11, 12, 6-21-80).

The police also recovered a Pontiac automobile at the scene where Mrs. Jackson's body was found. The van Mrs. Jackson had been driving on the day of her disappearance was located in Grundy, Virginia, where petitioner had been arrested on October 11, 1978 (T. 15-17, 6-21-80). The New York plates had been removed from the Pontiac and placed on the van (T. 16, 17, 6-21-80). Fingerprint analysis of the van and Pontiac revealed latent prints of petitioner in both vehicles (T. 19, 6-21-80).

The only additional significant evidence before the court relating to the existence of the aggravating circumstances was that provided by petitioner during his plea hearing on June 13, 1980. During the course of that hearing petitioner was advised that, "You do not have to say, sign or write or do anything that will tend to show that you are guilty of either of these offenses, unless you want to." (T. 3, 6-13-80). Subsequently, in response to questioning from the prosecutor and the court the petitioner admitted to the murder, rape, robbery and

kidnapping of Mrs. Jackson. Specifically, petitioner stated:

> Dean Goins and I came up from Florida, and . . . we were running low on money and so we pulled the shopping center [sic] and were sitting there, we were . . . deciding on what - how we was going to get some money so we decided to rob somebody and . . . Mrs. Jackson came out and we took her at gun point and robbed her.
>
> (T. 19, 6-13-80)

Later, the petitioner admitted to having sex with Mrs. Jackson without her consent, to shooting and stabbing her, and to taking her vehicle after her death (T. 20, 21, 6-21-80).

V. REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EVIDENCE OF THE AGGRAVATING CIRCUMSTANCES IN THIS CASE, INDEPENDENT OF PETITIONER'S ADMISSION OF GUILT, WAS SUFFICIENTLY RELIABLE TO JUSTIFY THE IMPOSITION OF A DEATH SENTENCE CONSISTENT WITH THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This Court, since its decision in Furman v. Georgia, 408 U.S. 238 (1972), has consistently recognized that a "qualitative difference" exists under the Eighth Amendment between death and any other punishment. This "qualitative difference" requires a corresponding "difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see also, Lockett v. Ohio, 438 U.S. 586, 601 (1978).

Similarly, this Court and the commentators have recognized that an accused should "not be convicted on his own uncorroborated confession." Smith v. United States, 348 U.S. 147, 152 (1954). See Jones on Evidence, Sixth Edition, Volume 2, §13:67. The policy underlying the "corpus delicti" rule stems from judicial recognition that a defendant's admission or confession may:

> be unreliable because . . . it is extracted from one who is under the pressure of a police investigation - whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.
>
> (emphasis added)
> Smith v. United States, supra at 153.

The rulings of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), In re Winship, 397 U.S. 358 (1970), and Jackson v. Virginia, 443 U.S. 307 (1979), require the State to present the trier of fact with rational evidence establishing the corpus delicti of a criminal act. Such a rule insures that conviction is based upon legally sufficient and reliable evidence. The facts of the case before this Court reveal that the State of Georgia failed to independently establish the corpus delicti of the aggravating circumstances of rape, armed robbery and kidnapping with bodily injury. Furthermore, the record of this case demonstrates that the admissions of petitioner at the time he entered his pleas of guilty were too unreliable to be "self authenticating" and support the sentence of death imposed upon him.

1. The State failed to independently establish the corpus delicti of the aggravating circumstance of rape.

The only evidence offered by the State to establish that petitioner had raped the deceased was uncorroborated hearsay testimony of the county medical examiner. He testified to awareness of some unspecified report indicating the presence of semen in the victim's vaginal secretions. No additional independent evidence was offered to prove that the victim was forcibly subjected to nonconsensual sexual intercourse. No additional evidence was offered, or existed, indicating that the victim suffered any other injuries consistent with a forcible rape. Nor was any evidence offered which established that the blood type of the semen found matched the blood type of petitioner.

The independent evidence presented by the State to prove the aggravated circumstance of rape simply failed to establish that any criminal act had been committed and therefore did not satisfy the necessity for a greater showing of "reliability in the determination that death was the appropriate punishment," in this case. Woodson v. North Carolina, supra.

2. The State failed to independently establish t e corpus delicti of the aggravating circumstance of armed robbery.

Georgia Annotated Code §26-1901 provides, in part, that a person is guilty of robbery, "when, with intent to commit theft, he takes property of another from the person

. . . (a) by use of force." The facts presented by the State at petitioner's aggravated circumstances hearing simply failed to establish the corpus delicti of armed robbery.

The record indicates that, after Mrs. Jackson's death, the petitioner abandoned his Pontiac automobile and subsequently was found to be in possession of the Jackson vehicle. The evidence also established that the tags from the Pontiac had been transferred to the Jackson vehicle. There was absolutely no independent nonconfessional evidence establishing that petitioner had formed the requisite intent to rob Mrs. Jackson prior to her death.

The nonconfessional evidence offered by the State to establish the aggravating circumstance of armed robbery was speculative at best, and failed to rationally establish the corpus delicti of the aggravating circumstance of armed robbery. The court's determination that death was the "appropriate punishment," based upon its finding of this aggravating circumstance, was therefore not sufficiently reliable to satisfy the protections guaranteed petitioner by the Fifth, Eighth and Fourteenth Amendments.

3. The State failed to independently establish the corpus delicti of the aggravating circumstance of kidnapping with bodily harm.

The State offered no independent nonconfessional evidence establishing the aggravated circumstance of kidnapping with bodily harm. The evidence presented by the State merely established that Rosemary Jackson missed a

2:30 p.m. appointment with her sister-in-law and that at 3:00 p.m. that same day she and petitioner purchased a C.B. radio 8 miles from the place where the two women were to have met.

There was no independent evidence to establish that Mrs. Jackson was abducted or held against her will. Indeed, the State's independent evidence is equally consistent with the theory that Mrs. Jackson was voluntarily in the company of petitioner inasmuch as there was no evidence suggesting that they did not already know one another nor that Mrs. Jackson was injured when the C.B. radio was purchased.

Again, the nonconfessional, independent evidence offered by the State to prove the aggravating circumstance of kidnapping with bodily harm was speculative and not sufficiently reliable to justify the determination that death was the appropriate sentence in this case. Woodson v. North Carolina, supra.

4. Petitioner's admissions themselves appear to be unreliable.

Additionally, this Court's attention is directed to several factors which suggest that petitioner's in-court admissions were less than reliable. First, on the date petitioner made these admissions he had ingested some unspecified pain medication (T. 11-13, 6-13-80). Petitioner indicated to the court that although the medication had stopped the pain, his ability to think clearly had not been impaired. The mere fact that petitioner was medicated raises serious questions about the reliability of his in-court

admissions.

The reliability of petitioner's admissions must also be questioned because of his inability to "self authenticate" the criminal acts he was being asked to admit. At one point petitioner stated that Mrs. Jackson had been stabbed twice, (T. 25, 6-13-80); in fact, she had been stabbed three times. At another point petitioner was unable to recall how many times Mrs. Jackson had been shot (T. 25, 6-13-80). Clearly, such confusion must cast significant doubt upon the reliability of petitioner's admissions and their use by the State to secure a death sentence against petitioner.

Finally, petitioner's letter to the prosecuting attorney (T. 15, 6-13-80)[3] strongly indicates that petitioner was seeking the most expeditious route to conclude the Georgia proceedings.[4] This Court has already recognized that the reliability of admissions may be greatly influenced by other factors collateral to the instant proceeding. Smith v. United States, supra. These collateral factors cannot be discounted in this case when the entire record is considered.

VI. CONCLUSION

The procedures employed by the State of Georgia to prove that the murder of Rosemary Jackson was committed under

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[3]Dear Mr. Huff, I am writing you this letter in hopes that I can go ahead to court and get this over, sir I don't want a jury trial, sir I want to plead guilty and get it over. I don't think there is any need of wasting the taxpayers money so sir, I hope we get this over, as soon as possible. Sincerely, Buddy Earl Justus

[4]At the time of the Georgia proceedings petitioner had already been sentenced to death in Florida. See CP 8.

aggravating circumstances failed to recognize the greater "need for reliability in the determination that death is the appropriate punishment" in this case. The State failed to present any reliable, independent evidence establishing the existence of the aggravating circumstances of rape, armed robbery, or kidnapping with bodily harm.

Moreover, the in-court admissions of petitioner were made under circumstances and in a manner which suggest inherent unreliability.

If the "qualitative difference" under the Eighth Amendment between death and any other sentence truly requires a greater "need for reliability in the determination that death is the appropriate punishment," then this Court should grant certiorari to consider whether the Georgia Supreme Court's affirmance of petitioner's death sentence violated his Fifth, Eighth and Fourteenth Amendment rights.

Petitioner prays that a writ will issue to review the judgment of the Georgia Supreme Court.

Respectfully submitted,

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ATTORNEY OF RECORD

Dated: Seattle, Washington
June 10, 1981

APPENDIX A

In The Supreme Court of Georgia

Decided: MAR 12 1981

36686. JUSTUS v. THE STATE.

Jordan, Chief Justice.

Buddy Earl Justus, the appellant, pleaded guilty to the October 7, 1978, murder, kidnapping with bodily injury, armed robbery and rape of Rosemary S. Jackson. Following a hearing, the appellant was sentenced to life imprisonment for the kidnapping with bodily injury, the armed robbery, and the rape, and to death for the murder. The case is presently before this court for mandatory sentence review, and is a companion case to Goins v. State, Ga. (Case No. 35691, decided January 8, 1981).

Although defense counsel has not enumerated any error in the proceeding below, he has requested this court to independently review the record to determine if error occurred.

The record establishes that, following the appellant's indictment, he informed the district attorney that he wished to plead guilty to all charges. In response the district attorney went to the appellant's jail cell and advised the appellant of his right to a trial by jury and his right to either a retained or appointed attorney. The district attorney further advised the appellant at this time that the state would seek the death penalty, and that said penalty would probably be imposed.

On May 23, 1980, the appellant was given a hearing in the Gwinnett Superior Court at which time the trial judge took the following actions.

First, the trial judge appointed an attorney who had been practicing law for fourteen to fifteen years and had handled over seventeen capital cases to represent the appellant. Second, he apprised the appellant of all of his constitutional rights, and told him that if the circumstances of the case otherwise warranted it, he had no conscientious, moral or religious objections to a sentence of death. (The appellant answered that he understood this and that he understood the rights explained to him). Third, the trial judge made the following findings of fact: the appellant was twenty-eight years old and had attended school through the tenth grade; he had been tried in a court of law three times prior to the present proceedings (he had one retained and two appointed attorneys); and, he understood the nature of the present proceeding. Finally, the trial judge set down June 13, 1980, ten days hence, as plea day.

During the ten day interim prior to plea day, the district attorney turned over to the appellant's appointed attorney, in addition to his entire file, the list of witnesses, the statement which the appellant had made to the Gwinnett County Police, a copy of the appellant's FBI rap sheet, a mental evaluation of the appellant, and the State Crime Lab Report.

On June 13, 1980, a plea hearing was held before the Gwinnett Superior Court. During said hearing, the appellant, with his attorney present, was extensively questioned by both the district attorney and the trial judge as to whether he understood each and every right and as to whether he was under the influence of any drugs, medicines or alcohol. Further, the trial judge explained to the appellant the alleged aggravating circumstances.

As the result of additional questioning, the trial judge found that the appellant had consulted with his attorney four times, and that his attorney had given the appellant all the time he needed or wanted to talk with him and discuss his situation (the appellant had had the attorney's phone number and could have called him at any time to discuss the case).

The trial judge also found that the appellant understood that he was pleading guilty without any recommendation on behalf of the state, and that the appellant was pleading guilty freely and voluntarily without promise of reward or threat of harm.

Finally, the trial judge found that the appellant was factually guilty and that he persisted in his plea of guilty despite his attorney's determination that the appellant had a better chance to avoid the death penalty with a jury than with the court (the attorney admitted, however, that despite discovery and consultation with his client, there were no material defenses to the charge).

The record establishes that the appellant was given a psychological evaluation in Virginia and, upon motion by defense counsel, in Georgia. These evaluations affirmatively show that the appellant was sane at the time he committed the crimes and could actively participate in his defense and was aware of the nature of the proceedings against him.

Upon independent review of the record, we find that the plea was properly accepted by the trial court and that no error occurred. See Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980); Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975); Hooks v. State, 233 Ga. 149 (210 SE2d 668) (1974).

SENTENCE REVIEW

The death sentence imposed in this case must be reviewed by this court under the standards set forth in Code Ann. § 27-2537(c)(1-3). Thus, we must determine whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports the trier of fact's finding of the statutory aggravating circumstances; and, whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.

We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. The trial judge found beyond a reasonable doubt the existence of the following statutory aggravating circumstances: (1) the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the armed robbery of Rosemary Jackson, Code Ann. § 27-2534.1(b)(2); (2) the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the kidnapping of Rosemary Jackson with bodily injury, Code Ann. § 27-2534.1(b)(2); (3) the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the rape of Rosemary Jackson, Code Ann. § 27-2534.1(b)(2), and (4) the offense of murder was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim, Code Ann. § 27-2534.1(b)(7).

From the evidence in this case, the trial court was authorized to find that the appellant and Dean Goins, a co-defendant, came to Georgia from Florida and decided to steal a van and rob someone. They pulled into a shopping center and sat there drinking beer until Rosemary S. Jackson, who was driving the type of van they desired, parked her van in the shopping center parking lot.

They abducted the victim at gunpoint and took her to Crack Road, a dirt access-road. The appellant drove the victim's van with the victim inside, and Goins drove the car that they had driven up from Florida.

On the way to the execution site the appellant stopped at a truck stop and made the victim purchase a C.B. unit, and pay for it with a credit card. The two proceeded to Crack Road where the appellant raped, stabbed and shot Mrs. Jackson. The co-defendant, Goins was present at the scene but did not participate in the rape or murder. The New York tag was removed from the car and placed on the van. The car was then left near the body, and the appellant and his co-defendant left in the van ultimately being arrested in Virginia.

The state presented evidence that the chief jailer had observed the appellant in jail and that the appellant was normal, and was totally aware of his surroundings, capable of taking care of himself and coordinating his daily activities, conversing with his cell mates and the jail staff.

Forensic evidence established that the victim had been raped and had suffered three stab wounds to her body (one stab wound went through the right breast into the right lung through the diaphragm and down into the liver, and two wounds went into the back, one to the lower part of the

shoulder blade, and the other one to the top of the right shoulder). The stab wounds occurred prior to death and caused considerable pain. The victim was then shot execution style with a single gunshot wound to the base of the skull just above the hairline. The appellant's fingerprints were located in the abandoned automobile.

The manager of the grocery store at the shopping center where the abduction took place became suspicious of the two men as they sat in the parking lot, and as he went to lunch, he wrote down the New York license plate number. The appellant was identified as the man coming in with the victim to the Atlanta Gateway Truck Stop where the C.B. radio was purchased.

In that the sentence of death in this case rests partially upon a finding of Code Ann. § 27-2534.1(b)(7), it must be reviewed in light of the United States Supreme Court's decision in Godfrey v. Georgia, 446 U. S. (100 SC 1759, 64 LE2d 398) (1980), as construed by this court in Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980).

"Torture" as the term is used in the statute occurs when the victim is subjected to serious physical abuse prior to death. Hance v. State, supra. Serious sexual abuse may be found to constitute serious physical abuse. Hance v. State, supra.

Rosemary S. Jackson was not killed instantaneously nor was she the victim of a domestic murder. She gave the appellant no reason whatsoever to assault her and was in no manner threatening. The appellant fled and attempted in every manner to hide his crime. See Godfrey v. Georgia, supra. Ms. Jackson was abducted and sexually assaulted prior to death. Therefore, the murder was outrageously or wantonly vile, horrible or inhuman in that this murder is

distinguishable from ordinary murders in which the death penalty is not appropriate. Green v. State, 246 Ga. 598 (272 SE2d 475) (1980). Under the facts of this case, we find that murder was of the type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim as set forth above.

The evidence supports a finding of the four aggravating circumstances by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 302 (99 SC 2781, 61 LE2d 560) (1979).

The appellant's co-defendant, Dean Goins, was sentenced to life imprisonment. See Goins v. State, supra. The question is thus presented whether, in light of the lesser sentence imposed on the co-defendant, appellant's sentence is disproportionate.

Each case must be evaluated on its unique factual circumstances, as there is no simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser penalty. Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979); McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980). We find material distinctions between appellant's case and the case of the co-defendant. First, the appellant was the actual perpetrator of the murder and rape of the victim, whereas the co-defendant was not, and in fact remained in the car while the killing took place. Second, there was evidence that the appellant was the prime mover and that to some extent Goins was coerced into assisting the appellant in the commission of the crimes. Juries in similar circumstances have sentenced "triggermen" to death while the same penalty has not been

imposed on co-defendants. These cases have been affirmed by this court. McClesky v. State, supra; Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Ross v. State, 233 Ga. 361 (211 SE2d 356) (1974).

We find that the appellant's sentence to death is neither excessive nor disproportionate to the penalty imposed in the case of his co-defendant. In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the Appendix support the affirmance of the death penalty.

This was the brutal rape and murder of an armed robbery victim committed for the sole purpose of financial gain and sexual gratification. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gregory, J., not participating.

36686. JUSTUS v. THE STATE.

APPENDIX

1. 27828. Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973)

2. 29473. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975)

3. 30635. Davis v. State, 236 Ga. 804 (225 SE2d 241) (1976)

4. 30761. Gibson v. State, 236 Ga. 874 (226 SE2d 63) (1976)

5. 32163. Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977)

6. 32220. Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977)

7. 32605. Spraggins v. State, 240 Ga. 759 (243 SE2d 20) (1978)

8. 33523. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)

9. 32744. Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978)

10. 33755. Johnson v. State, 242 Ga. 649 (250 SE2d 394) (1978)

11. 33879. Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979)
246 Ga. 261

12. 34814. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)

13. 35053. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)

14. 35524. Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1980)

15. 34813. Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979)
246 Ga. 262 (271 SE2d 272) (1980)

No. 80- (A.)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BUDDY EARL JUSTUS,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Application for Extension of Time in Which to File a Petition for Writ of Certiorari filed by petitioner has been served upon:

Harrison Kohler, Esq.
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square S.W.
Atlanta, Georgia 30334

via first class mail, postage prepaid. Done this 29th day of April, 1981.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

APPENDIX B

STATE OF GEORGIA	X	INDICTMENT NO. 78-B-291
VS.	X	FROM GWINNETT SUPERIOR COURT
BUDDY EARL JUSTUS	X	TO THE SUPREME COURT OF GEORGIA

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IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	INDICTMENT NO. 78B-291
	)	
vs.	)	CHARGES - MURDER, RAPE, ARMED ROBBERY AND KIDNAPPING
	)	
BUDDY EARL JUSTUS Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that BUDDY EARL JUSTUS , Defendant named above hereby appeals to the Supreme Court from the sentence of death given to him by the Honorable Reid Merritt, Judge of the Superior Court of the Gwinnett Judicial Circuit on June 25, 1980.

The Clerk please include the entire record.

This Court rather than the Court of Appeals has jurisdiction on appeal for the reason that the charges are capital felonies and the Defendant was sentenced to death.

Respectfully submitted,

WYNN PELHAM
Attorney for Defendant

1300 Plaza Drive, Suite 3
Lawrenceville, Georgia 30245

(404) 963-8563

FILED IN OFFICE

JUL 22 1980

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

WYNN PELHAM
Attorney at Law
1300 Plaza Drive
Suite 3
Lawrenceville, Georgia
30245
963-8563

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Notice of Appeal upon Counsel of Record for the State, Mr. Bryant Huff, District Attorney, P. O. Box 535, Lawrenceville, Georgia 30246, by placing a copy of same in the U. S. Mail with sufficient postage affixed thereon to insure prompt delivery.

This 11 day of July, 1980.

WYNN PELHAM
Attorney for Defendant

1300 Plaza Drive, Suite 3
Lawrenceville, Georgia 30245

(404) 963-0289

WYNN PELHAM
Attorney at Law
1300 Plaza Drive
Suite 3
Lawrenceville, Georgia
30245
963-0289

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	INDICTMENT NO. 78B-291
	)	
v.	)	CHARGES - MURDER, RAPE, ARMED ROBBERY AND KIDNAPPING
	)	
BUDDY EARL JUSTUS	)	
Defendant.	)	

PAUPER'S AFFIDAVIT

GEORGIA, GWINNETT COUNTY

Personally appeared before the undersigned, WYNN PELHAM, who says on oath that he is attorney for the Defendant Buddy Earl Justus , and that he was appointed to represent the said Defendant by the Honorable Reid Merritt, Judge of the Gwinnett Superior Court.

The said Court has instructed WYNN PELHAM to file an appeal in this case.

Affiant has received no money from Buddy Earl Justice or any member of his family or friends on his behalf, and Affiant has been promised no money by Buddy Earl Justice, or his family, or any other person on his behalf.

To the best of Affiant's knowledge, Buddy Earl Justice, is indigent and has no money.

Affiant further says that he will not accept any money from Buddy Earl Justice or any person on his behalf other than approved and directed by the Court.

This 22nd day of July, 1980.

WYNN PELHAM

Sworn to and subscribed before me
this 22nd day of July, 1980.

Notary Public, Georgia, State at Large

My Commission Expires _____

Notary Public, Georgia, State at Large
My Commission Expires Sept. 2, 1983

FILED IN OFFICE

JUL 22 1980

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

WYNN PELHAM
Attorney at Law
1300 Plaza Drive
Suite 3
Lawrenceville, Georgia
30246
963-8563

GEORGIA, GWINNETT COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors selected, chosen and sworn for the County of Gwinnett to-wit:

GEORGE BROOKS, FOREMAN
J. GRADY COLEMAN, VICE FOREMAN
MRS. BRENDA T. LOWREY, SEC.
MAX F. SAMPLES, DOORKEEPER
~~MRS. PATRICIA D. ARNOLD~~
WENDELL C. BAILEY
HUGH C. BISHOP, JR.
DICK T. BLEDSOE
PHILIP H. BRITT
ALBERT GERALD CAMP
ROBERT N. DUVAL
MRS. MILDRED D. ELKINS
CHARLES V. GOOLSBY
DAVID R. GOWER
ROYCE M. GREER
ROBERT N. IVY
MRS. ALLENE JOHNSON
JAMES M. LANFORD
RAYMOND L. ODOM
CHARLIE F. SCOTT
JAMES W. SIMPSON
MRS. JEAN B. STEPHENS
MRS. FLORENCE WINGO

in the name and behalf of the citizens of Georgia, charge and accuse BUDDY EARL JUSTUS AND DALE DEAN GOINS

of the County and State aforesaid with the offense of MURDER

for that the said BUDDY EARL JUSTUS AND DALE DEAN GOINS

on the 7th day of October in the year of our Lord Nineteen Hundred Seventy Eight in the County aforesaid, did then and there unlawfully and with malice aforethought kill one Rosemary S. Jackson, a human being by shooting said Rosemary S. Jackson with a certain pistol and stabbing said Rosemary S. Jackson with a certain knife, contrary to the laws of said State, the good order, peace and dignity thereof,

COUNT II

AND the jurors aforesaid in the name and behalf of the citizens of Georgia, further charge and accuse the said BUDDY EARL JUSTUS AND DALE DEAN GOINS with having committed the offense of KIDNAPPING for that the said accused on OCTOBER 7, 1978, in the County aforesaid did then and there unlawfully did abduct Rosemary S. Jackson, a person, without lawful authority and held such person against her will in which she received bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof,

COUNT III

AND the jurors aforesaid in the name and behalf of the citizens of Georgia, further charge and accuse the said BUDDY EARL JUSTUS AND DALE DEAN GOINS with having committed the offense of ARMED ROBBERY for that the said accused on OCTOBER 7, 1978, in the County aforesaid did then and there unlawfully with the intent to commit theft, took from the person of Rosemary S. Jackson, the following property, to-wit: one 1975 Dodge Maxi Van motor vehicle, gold color, bearing Georgia Tag No. WC7385, one pocketbook, credit cards and lawful U. S. currency of the property of Rosemary S. Jackson, of a total value in excess of one thousand dollars ($1,000.00) by use of a certain knife and pistol, the same being offensive weapons, contrary to the laws of said State, the good order, peace and dignity thereof,

COUNT IV

AND the jurors aforesaid in the name and behalf of the citizens of Georgia, further charge and accuse the said BUDDY EARL JUSTUS AND DALE DEAN GOINS with having committed the offense of RAPE for that the said accused on OCTOBER 7, 1978, in the County aforesaid did then and there unlawfully did have carnal knowledge of Rosemary S. Jackson, a female, forcibly and against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

T. E. GARMON
PROSECUTOR

GWINNETT SUPERIOR COURT

SEPTEMBER ADJ. TERM, 1978

BRYANT HUFF, DISTRICT ATTORNEY

SPECIAL PRESENTMENT

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	+	INDICTMENT NO. 78-B-291
	+	CHARGES:
v.	+	Count One - Murder Count Two - Kidnapping
BUDDY EARL JUSTUS,	+	Count Three - Armed Robbery Count Four - Rape
Defendant	+	

O R D E R

It appearing to the Court that the above defendant is charged with having committed a crime in Gwinnett County and that he is, because of his poverty, indigent and unable to pay an attorney for his defense, it is thereupon considered and ordered that the Honorable WYNN PELHAM is hereby appointed to represent the said Defendant as his attorney.

IT IS SO ORDERED this 23rd day of May, 1980.

Reid Merritt

REID MERRITT, Judge
Gwinnett Superior Court

FILED IN OFFICE

MAY 23 1980

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	§	INDICTMENT NO. 78-B-291
VS.	§	
BUDDY EARL JUSTUS	§	COUNT I: MURDER

TO: THE JUDGE OF SAID COURT AND THE ATTORNEY OF RECORD FOR THE DEFENDANT, WYNN PELHAM

NOTICE OF AGGRAVATING CIRCUMSTANCES

Pursuant to the provisions of the General Acts and Resolutions, Acts of 1973, Volume 1, Pages 164 and 165, Code Section designated by the Acts as 27-2534.1 and other pertinent sections of said Act as amended, the undersigned as District Attorney, submits to the Court and said defendant that the State contends and expects to prove in said case that the defendant committed the aforesaid crimes under the following aggravating circumstances, to-wit:

As to Count I -- MURDER

-1-

The offense of Murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Armed Robbery of ROSEMARY JACKSON. (Code Section 27-2534. 1-B-2.)

-2-

The offense of Murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Kidnapping of ROSEMARY JACKSON with Bodily injury

-3-

The offense of Murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the rape of ROSEMARY JACKSON.

-4-

The offense of Murder was committed by a person (the defendant) with a prior record of conviction for a capital felony, to-wit: the murder of STEPHANIE MICHELLE HAWKINS in Pasco County, Florida, on October 6, 1978, said conviction and sentence of death being had on Indictment No. CF 78-884B-01 in the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pasco County, duly filed on October 20, 1978.

-5-

The offense of Murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim (Code Section 27-2534. 1-B-7).

WHEREFORE, the undersigned files this notice with the Court and serves a copy hereof upon the defendant's attorney prior to the trial of the case, all as required by law, this 13 day of June, 1980.

Bryant Huff
BRYANT HUFF, DISTRICT ATTORNEY
GWINNETT JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that I have this 13 day of June, 1980, duly served the attorney of the defendant in person with a copy hereof.

Bryant Huff
BRYANT HUFF, DISTRICT ATTORNEY
GWINNETT JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

MINUTE BOOK A-108

PAGE 67

STATE OF GEORGIA

VS.

BUDDY EARL JUSTUS

INDICTMENT NO. 78-B-291

COUNT I MURDER

COUNT II KIDNAPPING

COUNT III ARMED ROBBERY

COUNT IV RAPE

PLEA OF DEFENDANT

The defendant, BUDDY EARL JUSTUS, waives formal arraignment ~~and agrees to strike from a panel of 42 jurors~~ and pleads: GUILTY.

This 13 day of JUNE, 1980.

DEFENDANT

DEFENDANT'S ATTORNEY

BRYANT HUFF, DISTRICT ATTORNEY

VERDICT OF THE JURY

We, the jury, find the defendant, BUDDY EARL JUSTUS,

_____ OF COUNT I MURDER

and

_____ OF COUNT II KIDNAPPING

and

_____ OF COUNT III ARMED ROBBERY

and

_____ OF COUNT IV RAPE

This ____ day of _____, 1980.

FOREMAN OF THE JURY

We the Jury find the Defendant.

_____

_____ Guilty

This _____ day of _____ 197____

_____
Foreman

_____

CT

We the Jury fix the Defendant's punishment at _____ years.

This _____ day of _____ 197____

_____
Foreman

INDICTMENT NO. 28-B-291

SUPERIOR COURT

GWINNETT COUNTY

SEPTEMBER ADJ. Term, 197 8

THE STATE

Vs.

BUDDY EARL JUSTUS
AND
DALE DEAN GOINS

OFFENSES: CT. I: MURDER

COUNT II: KIDNAPPING

COUNT III: ARMED ROBBERY

COUNT IV: RAPE

A true BILL

George C. Brooks Foreman

T. E. GARMON Prosecutor

BRYANT HUFF, District Attorney

SPECIAL PRESENTMENT

Received in open court from the sworn Grand Jury Bailiff and filed in office.

This 24 day of Oct, 1978

O. Millard Lang Clerk

The Defendant

_____

waives his rights to an attorney, formal arraignment, copy of Bill of Indictment, list of witnesses, and agrees to strike from a panel of _____ Jurors and pleads _____ guilty.

This _____ day of _____, 197____

_____
Defendant's Attorney

_____
Defendant

_____
BRYANT HUFF District Attorney

WITNESSES

T. E. GARMON

ARRAIGNED

DEFENDANT	DATE	DIST. ATTY.
DEFENDANT	DATE	DIST. ATTY.
DEFENDANT	DATE	DIST. ATTY.

ARRAIGNMENT WAIVED

DEFENDANT	DATE	DIST. ATTY.
DEFENDANT	DATE	DIST. ATTY.
DEFENDANT	DATE	DIST. ATTY.

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	+	INDICTMENT NUMBER 78-B-291
	+	
v.	+	CHARGES: MURDER, RAPE,
	+	ARMED ROBBERY and KIDNAPPING
BUDDY EARL JUSTUS,	+	
DEFENDANT	+	

FINDING OF AGGRAVATING CIRCUMSTANCES PURSUANT TO GA. CODE ANN. §27-2528 and 27-2534.1

The defendant, BUDDY EARL JUSTUS, entered a plea of guilty to the charges of murder, kidnapping with bodily injury, armed robbery, and rape. The Court accepted the plea and conducted a pre-sentence trial as required by Ga. Code Ann. §27-2503(a). At the conclusion of that trial the court took the matter of sentencing under advisement.

Based on a consideration of the evidence bearing on the issues of aggravation and mitigation, the court finds that the State has proven beyond a reasonable doubt the existence of the following aggravating circumstances in relation to the crime of murder:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: The armed robbery of Rosemary Jackson. (Code §27-2534. 1-B-2.)

(2) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: The kidnapping of Rosemary Jackson with bodily injury.

(3) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: The rape of Rosemary Jackson.

(4) The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim (Code §27-2534.1-B-7).

THIS 24th day of June, 1980.

Reid Merritt

REID MERRITT, Judge
Gwinnett Superior Court

FILED IN OFFICE

JUN 24 1980

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	+	INDICTMENT NUMBER 78-B-291
	+	
v.	+	CHARGES: MURDER, RAPE,
	+	ARMED ROBBERY and KIDNAPPING
BUDDY EARL JUSTUS,	+	
DEFENDANT	+	

S E N T E N C E

The defendant having entered a plea of guilty to the charge of Murder, Kidnapping with bodily injury, Armed Robbery and Rape, the Court imposes the following sentence:

I

The Court having found beyond a reasonable doubt that aggravating circumstances existed in the commission of the crime of murder, it is hereby ordered that the defendant, BUDDY EARL JUSTUS, be taken from this Court to the Gwinnett County Jail under such guard and protection as may be deemed necessary there to be safely and securely kept until removal to the custody of the State Penitentiary designated by the Commissioner of the Department of Offender Rehabilitation for the purpose of carrying out this sentence in the manner prescribed by law.

It is further ordered that on the 28th day of July, 1980, the defendant, BUDDY EARL JUSTUS, shall be executed by the Superintendent of the State Penitentiary designated by the Commissioner of the Department of Offender Rehabilitation for such purposes, in accordance with the laws of Georgia.

It is further ordered that the Sheriff of Gwinnett County shall convey and deliver the defendant, BUDDY EARL JUSTUS, to the designated State Penitentiary not more than twenty (20) days and not less than two (2) days prior to the time fixed herein for the execution of the defendant unless otherwise directed by the Governor or unless a Stay of Execution has been caused by

appeal or other order of a Court of competent jurisdiction; and it is further ordered that said defendant, BUDDY EARL JUSTUS, on the day fixed herein be by the Superintendent of the designated State Penitentiary electrocuted and be put to death at the time and place and in the manner provided by law.

FURTHERMORE, the Defendant having entered a plea to the charges of Rape, Armed Robbery and Kidnapping, it is ordered that said Defendant, BUDDY EARL JUSTUS, be sentenced to life imprisonment on each of these charges.

IT IS SO ORDERED this 24th day of June, 1980.

Reid Merritt

REID MERRITT, Judge
Gwinnett Superior Court

FILED IN OFFICE

JUN 24 1980

O. Mitchell Lacy

CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

CASE NO 36686
SUPREME COURT OF GEORGIA

GEORGIA, GWINNETT COUNTY

CLERK'S OFFICE, SUPERIOR COURT

I, O. Millard Peevy, Clerk of Superior Court do hereby certify that the foregoing and attached 36 pages contain a ~~true and correct copy of~~ The original Report of the Trial Judge in Case No. 78-B-291, The State v. Buddy Earl Justus

Copy of ~~as~~ same is of file and of record in this office.

Witness my official signature and seal this 9 day of March, 19 81

O. Millard Peevy
Clerk Superior Court,
Gwinnett County, Georgia

NO. 80-6844

ORIGINAL

RECEIVED
JUL 9 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BUDDY EARL JUSTUS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF ON BEHALF OF THE RESPONDENT

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

10

QUESTION PRESENTED

Where an accused makes a knowing and voluntary plea to the offense of an execution style murder committed during the course of an armed robbery, kidnapping, and rape of the victim and where there is a factual basis for the plea, is the death penalty constitutional?

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Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied ___ U.S. ___ (1980). 5

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Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975), cert. denied 428 U.S. 910 (1976). 5

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied 428 U.S. 910 (1976) 5

North Carolina v. Pearce, 395 U.S. 711 (1969) 5

Statutes Cited:

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NO. 80-6844

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BUDDY EARL JUSTUS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

Petitioner Buddy Earl Justus, who is under death sentence in Florida, Georgia, and Virginia for three different murders, was arrested in Virginia and eventually returned to Georgia.

Following Petitioner's indictment, he informed the district attorney that he wished to plead guilty to all charges. In response the district attorney went to the Petitioner's jail cell and advised the Petitioner of his right to a trial by jury and his right to either a retained or appointed attorney. The district attorney further advised Petitioner at this time that the State would seek the death penalty, and that the death penalty would probably be imposed.

A hearing was held May 23, 1980, in the Superior Court of Gwinnett County, Georgia. Petitioner tried to plead guilty at that time but the judge refused to accept the plea.

Instead the trial judge appointed an attorney who had been practicing law for approximately fifteen years and had handled over seventeen capital cases to represent Petitioner. The judge informed Petitioner of all of his constitutional rights, and told Petitioner that if the circumstances of the case otherwise warranted it, the judge had no conscientious, moral or religious objections to a sentence of death. Petitioner answered that he understood this and that he understood the rights explained to him. Also, the trial judge made the following findings of fact: Petitioner was twenty-eight years old and had attended school through the tenth grade; he had been tried in a court of law three times prior to the present proceedings (he had one retained and two appointed attorneys); and, he understood the nature of the present proceeding. Finally, the trial judge set down June 13, 1980, as plea day.

During the interim prior to plea day, the district attorney turned over to Petitioner's appointed attorney, in addition to district attorney's entire file, the list of State's witnesses , the statement which Petitioner had made to the Gwinnett County Police, a copy of Petitioner's FBI rap sheet, a mental evaluation of Petitioner, and the State Crime Lab Report.

On June 13, 1980, a hearing was held, and Petitioner admitted kidnapping, robbing, raping and killing the victim. Both Petitioner and his attorney were extensively questioned by the trial judge. It was unequivocal that Petitioner understood his constitutional rights and the consequences of entering a guilty plea.

The Court accepted the plea and held an additional hearing June 21, 1980. Two psychiatric reports of Petitioner were tendered. Also eight State witnesses testified. Medical examiner Donald Dave testified that the victim had first been stabbed three times, then shot in the back of the head. Although the stab wounds were exceedingly painful and would have eventually caused the victim's death, the gunshot wound was the actual cause of death. Officer W. V. Morgan found Petitioner's fingerprints at the murder scene, and Sheila Miller saw Petitioner and the victim together just prior to the murder. The psychiatric reports established that Petitioner was not psychotic, incompetent, or insane. He was in contact with reality and knew right from wrong.

From the evidence in this case, the trial court was authorized to find that Petitioner and Dean Goins, a co-defendant, came to Georgia from Florida and decided to steal a van and rob someone. They pulled into a shopping center and sat there drinking beer until Rosemary S. Jackson, who was driving the type of van they desired, parked her van in the shopping center parking lot.

They abducted the victim at gunpoint and took her to Crack Road, a dirt access-road. Petitioner drove the victim's van with the victim inside, and Goins drove the car that they had driven up from Florida.

On the way to the execution site Petitioner stopped at a truck stop and made the victim purchase a C.B. unit, and pay for it with a credit card. The two proceeded to Crack Road where the Petitioner raped, stabbed and shot Mrs. Jackson. The co-defendant, Goins was present at the scene but did not participate in the rape or murder. The New York tag was removed

from the car and placed on the van. The car was then left near the body, and Petitioner and his co-defendant left in the van, ultimately being arrested in Virginia.

On June 24, 1980, the trial court found that the murder was committed during the capital felonies of armed robbery, kidnapping with bodily injury, and rape; also the Court found that the murder was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim. The death penalty was imposed.

The conviction and sentence were upheld on the automatic review by the Georgia Supreme Court. Justus v. State, 247 Ga. 276, 276 S.E.2d 242 (1981).

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THAT IS THE MOST EXPEDITIOUS WAY OF RESOLVING PETITIONER'S CLAIM THAT A DEATH PENALTY CANNOT BE IMPOSED UPON A KNOWING AND VOLUNTARY PLEA OF GUILTY.

Georgia Courts have consistently held that a death penalty may be imposed upon the entry of a knowing and voluntary guilty plea to murder. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied ___ U.S. ___ (1980); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975), cert. denied 428 U.S. 910 (1976); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied 428 U.S. 910 (1976).

To hold otherwise would in effect punish an accused in a capital case for exercising his constitutional right to a trial by jury. Cf. Blackledge v. North Carolina, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).

The record in Petitioner's case is fully developed. If this Court denies a writ of certiorari, this Court will be faced with another petition for writ of certiorari when State habeas relief is denied, see Ga. Code Ann. § 50-127, and a third petition upon the denial of federal habeas relief. See 28 U.S.C. § 2254.

The only issue in this case is whether the death penalty can be imposed upon a knowing and voluntary guilty plea to the crime of murder. The most expeditious way to resolve Petitioner's claim is by the granting of a writ of certiorari.

See generally Coleman v. Balkcom, ___ U.S. ___, 68 L.Ed.2d 334 (1981) (J. Rehnquist dissenting).

Respectfully submitted,

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

BRYANT HUFF
District Attorney
Gwinnett Judicial Circuit

Please serve:

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132 State Judicial Bldg.
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